

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE DIVISION

WILLIAM E. FLEMING,

NO. 5:11-cv-01830 EJD (PSG)

Plaintiff(s),

**ORDER DENYING PLAINTIFF'S  
 MOTION TO REMAND**

v.

AC SQUARE, INC.,

[Docket Item No. 16]

Defendant(s).

Plaintiff William E. Fleming ("Plaintiff"), appearing pro se, filed the instant Motion to Remand this action back to the Superior Court from which it originated ("Motion"). Defendant AC Square, Inc. ("Defendant") opposes the request in written opposition. Having reviewed the written submissions for this matter, the court finds it suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b). As such, the hearing scheduled for August 12, 2011, is vacated. The Motion will be denied for the reasons stated below.<sup>1</sup>

**I. FACTUAL AND PROCEDURAL BACKGROUND**

For context, the court recites various allegations from Plaintiff's original complaint and First Amended Complaint ("FAC"). See Def.'s Request for Judicial Notice ("RJN"), at Exs. 1, 4. Plaintiff is a former employee of Defendant. On November 3, 2007, Plaintiff was demoted from his supervisory position without warning or reason. In response, Plaintiff, who is African-American, requested that Defendant place him in a comparable supervisory-level position. Although such a

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<sup>1</sup> This disposition is not intended for publication in the official reports.

position did become available soon after Plaintiff's request, it was given to a Hispanic employee with less experience and ability. Plaintiff continued to work for Defendant after the demotion, but experienced racial remarks from other employees. He eventually filed a formal complaint with the Equal Employment Opportunity Commission ("EEOC") on January 2, 2008, and was eventually laid-off on August 13, 2008. Plaintiff believes Defendant's actions were racially-motivated.

After the EEOC issued Plaintiff a right-to-sue notice, he commenced an action against Defendant in Santa Clara County Superior Court on October 31, 2008. See RJN at Ex. 1. Defendant eventually filed a Motion for Judgment on the Pleadings (see RJN at Ex. 2), which the Superior Court granted on March 9, 2011. See RJN at Ex. 3. Plaintiff was allowed ten days within which to file and serve an amended complaint. Id. He did so on March 17, 2011. See RJN at Ex. 4. Unlike the original complaint which contained no statutory references, the FAC indicated Plaintiff was seeking relief under Title VII of the Civil Rights Act of 1964. Id. In light of that amendment, Defendant removed the action to this court on April 14, 2011. See Docket Item No. 1. This Motion followed.

## II. DISCUSSION

Before turning to the propriety of the removal which occurred here, the court must first address two distinct issues. The first is Defendant's RJN. See Docket Item No. 25. The second is Defendant's argument that the Motion must be dismissed due to certain procedural shortcomings. As explained below, the former will be granted while the latter is rejected.

### A. Judicial Notice

Pursuant to Federal Rule of Evidence 201, the court may take judicial notice of facts "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). This includes documents filed in state court proceedings. See Porter v. Ollison, 620 F.3d 952, 955 (9th Cir. 2010). A court "shall take judicial notice if requested by a party and supplied with the necessary information." See Fed. R. Evid. 201(d).

Here, Defendant requests the court take judicial notice of the following: (1) the original

1 complaint filed in the Superior Court on October 31, 2008; (2) Defendant's Notice of Motion and  
2 Motion for Judgment on the Pleadings, filed in the Superior Court on February 9, 2011; (3) a  
3 Superior Court order filed March 9, 2011, granting Defendant's Motion for Judgment on the  
4 Pleadings; and (4) the FAC filed in the Superior Court on March 17, 2011. Plaintiff does not dispute  
5 the authenticity of these documents. Since each document is judicially noticeable as a record filed in  
6 the state court action underlying the instant proceeding, Defendant's RJN is granted in its entirety.

7 **B. Procedural Defects**

8 Defendant argues that the Motion's lack of a legal memorandum amounts to "substantial  
9 prejudice" since, as Defendant puts it, it has been "left to largely guess as to the basis and grounds  
10 for the requested relief." Defendant further contends this procedural defect alone requires denial of  
11 the Motion. The court disagrees.

12 Despite Defendant's claim to the contrary, the state of the pleadings demonstrate that it has  
13 not suffered prejudice, let alone substantial prejudice, from the absence of the memorandum  
14 seemingly required by Local Civil Rules 7-2 and 7-4. See In re Telemart Ent., Inc., 524 F.2d 761,  
15 766 (9th Cir. 1975) (stating that one party's noncompliance with local rules should not justify court  
16 action if it does not cause prejudice to another party). With regard to Plaintiff's pleadings, the  
17 Notice of Motion adequately describes Plaintiff's request for an order "remanding this action to the  
18 Superior Court of the State of California, County of Santa Clara." See Docket Item No. 16. Plaintiff  
19 also relies on a document entitled "Notice of Opposition to Removal to Federal Court" ("Notice of  
20 Opposition"), which both responds factually to the statements contained in the Notice of Removal  
21 and provides legal citation and argument. See Docket Item No. 15. For Defendant, its pleading in  
22 opposition contains a coherent legal discussion which directly addresses the issues raised by  
23 Plaintiff. Defendant was also able to discern the evidence necessary to support its position and  
24 included such evidence in the RJN. From these observations, the court can only conclude that  
25 Plaintiff's Motion and supporting papers provided sufficient notice of the relief requested as well as  
26 the basis for such relief, to which Defendant formulated an appropriate rebuttal. Defendant did not  
27 need to resort to guesswork to articulate an intelligent defense if it did so, even if Plaintiff's  
28 pleadings contain information of minimal relevance to the remand issue.

Moreover, while the court recognizes that Plaintiff is “expected to abide by the rules of the court in which he litigates” (Carter v. Comm’r of Internal Revenue, 784 F.2d 1006, 1008 (9th Cir. 1986)), this responsibility must nonetheless be tempered by the policy to liberally construe procedural requirements for a pro se litigant such as Plaintiff. Abassi v. Immigration & Naturalization Serv., 305 F.3d 1028, 1032 (9th Cir. 2002). The court has done so here. Consequently, Defendant’s invitation to deny the Motion based solely on procedural defects is declined.

### C. Remand

The court now addresses Plaintiff’s remand request. Such an examination requires a review of settled jurisdictional principles.

Federal removal jurisdiction is a creation of statute. See Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979) (“The removal jurisdiction of the federal courts is derived entirely from the statutory authorization of Congress.”). Only those state court actions that could have been originally filed in federal court may be removed. 28 U.S.C. § 1441(a) (“Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant.”); see also, e.g., Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (“Only state-court actions that originally could have been filed in federal court may be removed to federal court by defendant.”). Accordingly, the removal statute provides two basic ways in which a state court action may be removed to federal court: (1) the case presents a federal question, or (2) the case is between citizens of different states. 28 U.S.C. §§ 1441(a), (b). It falls upon the defendant to show the basis for federal jurisdiction. Nishimoto v. Federman-Bachrach & Assoc., 903 F.2d 709, 712 (9th Cir. 1990). Removal jurisdiction statutes are strictly construed against removal. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941).

The Notice of Removal filed in this action relies on the presence of a federal question in the FAC. See Docket Item No. 1, at ¶ 12. When that is the case, the court looks to the face of a well-pleaded complaint to determine whether a cause of action is created by federal law or whether the plaintiff’s right to relief necessarily depends on the resolution of a substantial question of federal

law. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808 (citing Franchise Tax Bd. of California v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983)). “[I]t must be clear from the face of the plaintiff’s well-pleaded complaint that there is a federal question.” Duncan v. Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996). The complaint as it existed at time of removal dictates whether removal jurisdiction is proper. Libhart, 592 F.2d at 1065.

In this case, the court construes the FAC as that was the operative pleading at the time of removal. As Defendant points out, the FAC contains a recitation of allegations against Defendant followed by a clarification that Plaintiff is “seeking monetary relief and punitive damages under Title VII of the Civil Rights Act of 1964.” See RJN at Ex. 4. He also directly quotes two provisions of 42 U.S.C. § 2000e-2(a). Id. Those references to federal statutes are the only legal citations in the FAC and appear to be more than incidental notation. See Easton v. Crossland Mortg. Corp., 114 F.3d 979, 982 (9th Cir. 1997) (“[T]he mere reference of a federal statute in a pleading will not convert a state law claim into a federal cause of action...”). Although the actual allegations are not organized by distinct causes of action, putting the statutory citation together with the facts alleged demonstrates that Plaintiff intended to bring a claim for unlawful employment practices under 42 U.S.C. § 2000e-5(f)(1). In addition, both the monetary and punitive damages sought by Plaintiff are potential remedies for claims brought under Title VII. 42 U.S.C. § 1981a(b)(1); Kolstad v. Am. Dental Ass’n, 527 U.S. 526, 529 (1999). Thus, under the current state of the pleadings, a federal question does appear on the face of the FAC. This forms the basis of federal jurisdiction.

In the Notice of Opposition, Plaintiff makes two arguments in support of his request to remand. Neither are convincing. First, Plaintiff claims Defendant violated certain state laws, including the California Fair Employment and Housing Act (“FEHA”), and California Government Code § 11135 et. seq., as well as portions of the California Constitution. See Not. of Oppo. at p. 7. The court interprets this statement Plaintiff’s representation that he meant to plead only violations of California law. It is true that Plaintiff, as the master of his action, may decide the body of law he will rely upon when federal and state authorities coincide. See Pan American Petro. Corp. v. Super. Ct., 366 U.S. 656, 662-63 (1961) (stating that “the party who brings a suit is master to decide what law he will rely upon.”). But what Plaintiff cannot do is make that choice in the FAC and then

1 attempt to recharacterize federal claims as pure state claims to fit within a motion to remand. Cf.  
 2 Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, 159 F.3d 1209, 1213 (“[J]urisdiction must be  
 3 analyzed on the basis of the pleadings filed at the time of removal without reference to subsequent  
 4 amendments.”). Plaintiff could have avoided the prospect of a federal forum by relying exclusively  
 5 on state law in the FAC. Caterpillar, 482 U.S. at 392. He instead specifically relied on federal  
 6 statutes. Unfortunately for Plaintiff, such reliance is fatal to this argument.

7 Finally, Plaintiff believes the removal was untimely based on 28 U.S.C. § 1446(b). The  
 8 pertinent portion of that subsection states:

9 If the case stated by the initial pleading is not removable, a notice of  
 10 removal may be filed within thirty days after receipt by the defendant,  
 11 through service or otherwise, of a copy of an amended pleading,  
 12 motion, order or other paper from which it may first be ascertained  
 13 that the case is one which is or has become removable, except that a  
 14 case may not be removed on the basis of jurisdiction conferred by  
 15 section 1332 of this title [28 USCS § 1332] more than 1 year after  
 16 commencement of the action.

17 Here, Plaintiff’s initial form complaint did not contain reference to a federal statute. See  
 18 RJN at Ex. 1. For this reason, the state court action was not immediately removable to this court as  
 19 there was no other basis for federal jurisdiction. However, this action did become removable when  
 20 Plaintiff clarified his federal claim by filing and serving the FAC on March 17, 2011. See RJN at  
 21 Ex. 4. Defendants then filed the Notice of Removal on April 14, 2011 - within the thirty day period  
 22 provided by § 1446(b). As such, the removal of this action from state court was timely based on the  
 23 amended pleading establishing federal jurisdiction. See Harris v. Bankers Life & Cas. Co., 425 F.3d  
 24 689, 694-95 (9th Cir. 2005). The portion of § 1446(b) cited by Plaintiff which prohibits removal of  
 25 an action more than one year after its commencement applies only to cases establishing federal  
 26 jurisdiction through diversity, as evidenced by the presence of 28 U.S.C. § 1332 in the statute. That  
 27 limitation does not apply to this action invoking federal question jurisdiction under 28 U.S.C. §  
 28 1331. See Docket Item No. 1, at ¶ 12.

In light of the preceding discussion, the court finds that Defendant met its burden to  
 demonstrate the basis for federal jurisdiction. Plaintiff’s arguments in favor of remand to the  
 Superior Court fail. The court will therefore deny the Motion.

**III. ORDER**

Based on the foregoing, the hearing scheduled for August 12, 2011, is VACATED.  
Plaintiff's Motion to Remand is DENIED.

**IT IS SO ORDERED.**

Dated: August 4, 2011



EDWARD J. DAVILA  
United States District Judge

**THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

Benjamin A. Emmert bemmert@littler.com  
Ronald A. Peters rpeters@littler.com

**Dated: August 4, 2011**

**Richard W. Wieking, Clerk**

**By: /s/ EJD Chambers**

**Elizabeth Garcia**  
**Courtroom Deputy**